Gan Kok Beng & Anor v Hong Kwi Seong

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–47 OF 1995
KAMALANATHAN RATNAM J
31 DECEMBER 1999

Contract *— Terms — Sale of electronic billboard — Assignment of billboard from first plaintiff to second plaintiff — Who is actual purchaser — Whether 'sold' means selling of advertising space on billboard and not transferring of ownership of billboard — Term that payment to be subject to billboard being sold; whether condition precedent to agreement — 'Fully commissioned' product; whether accepted by buyer*

The first plaintiff was the chairman of a group of companies, one of whose subsidiaries was the second plaintiff. Pursuant to an agreement dated 17 April 1993, the first plaintiff purchased from the defendant an electronic billboard ('the billboard'). It was purchased in the first plaintiff's name as he intended to inject it into one of his companies. The first plaintiff however did not receive any cash consideration for the transfer of the billboard to the second plaintiff which he effected by way of an assignment. The first payment of the purchase consideration to the defendant for the billboard did not come from the first plaintiff but was a set-off of mutual debts existing between the plaintiff's group of companies and the defendant's group of companies. Clause 3(c) of the agreement provided that payment as set out in the first schedule in the contract was always subject to the billboard being sold and income received and, if no sale was made, the payment would be deferred until income was received. On 18 August 1994, the second plaintiff terminated the agreement on the ground that the defendant had failed to fully commission the billboard. The plaintiffs claimed against the defendant the first payment of RM245,938.27 and loss of revenue.

Held, allowing the claim:

(1) There was no doubt that the defendant was aware that it was the second plaintiff that was the actual purchaser of the billboard and not the first plaintiff. The unrebutted evidence of the first plaintiff of his discussion with the defendant leading to the signing of the agreement between him and the defendant and the subsequent agreement between the defendant's company and a subsidiary of the second plaintiff clearly indicated that the defendant was well and truly aware of the assignment. The conduct of the defendant in dealing with the second plaintiff with no further interference from the first plaintiff other than having signed the initial agreement to purchase was sufficient for the court to be satisfied that the defendant had indeed notice of, and had impliedly consented to the assignment (see p 170D–G).

(2) The court accepted the meaning given by the first plaintiff in his evidence that 'sold' referred to the selling of the advertising space on the billboard. It could not by any stretch of the imagination mean selling of the billboard and transferring ownership (see p 171D).

(3) The entire cl (3) was couched in terms that indicate that that the meaning to be ascribed to it was that the terms contained therein were conditions precedent to the effectiveness of the agreement (see p 171D–E).

(4) In the advertising industry, 'fully commissioned' means that the equipment has been fully tested and accepted by the buyer. There was no such acceptance by the second plaintiff. In fact, the defendant himself in his letter dated 28 March 1994 qualified the full commissioning by stating that he would rectify certain shortcomings within two weeks and he failed to do that. The defendant had clearly breached the agreement (see pp 173C–D, 174B).

[Bahasa Malaysia summary

Plaintif pertama adalah pengerusi suatu kumpulan syarikat-syarikat, di mana salah satu anak-anak syarikat adalah plaintif kedua. Menurut suatu perjanjian bertarikh 17 April 1993, plaintif pertama telah membeli daripada defendan suatu papan iklan elektronik. Ia telah dibeli di atas nama plaintif pertama oleh kerana beliau berniat untuk memberikannya kepada salah satu syarikatnya. Namun, plaintif pertama tidak menerima sebarang balasan tunai untuk pemindahan papan iklan kepada plaintif kedua di mana beliau berbuat demikian secara serahhak. Pembayaran pertama sebagai balasan pembelian kepada defendan untuk papan iklan tersebut tidak datang dari plaintif pertama tetapi adalah tolakan hutang secara bersesama hutang yang berterusan antara kumpulan syarikat-syarikat plaintif dan kumpulan syarikat-syarikat defendan. Fasal 3(c) perjanjian tersebut memperuntukkan bahawa pembayaran seperti yang terbentang di dalam jadual pertama di dalam kontrak adalah sentiasa tertakluk kepada papan iklan dijual dan pendapatan yang diterima dan sekiranya tiada jualan dibuat, pembayaran akan ditangguh sehingga pendapatan diterima. Pada 18 Ogos 1994, plaintif kedua telah menamatkan perjanjian tersebut di atas alasan bahawa defendan gagal untuk menyempurnakan operasi papan iklan tersebut. Plaintif telah menuntut terhadap defendan pembayaran pertama sebanyak RM245,938.27 dan juga kehilangan pendapatan.

Diputuskan, membenarkan tuntutan tersebut:

(1) Tidak diragukan bahawa defendan sedar bahawa plaintif kedua adalah pembeli sebenar papan iklan tersebut dan bukannya plaintif pertama. Keterangan plaintif pertama yang belum dipatahkan mengenai perbincangannya dengan defendan yang membawa kepada perjanjian tersebut ditandatangani antaranya dan defendan tersebut dan perjanjian yang seterusnya antara syarikat defendan dan subsidiari plaintif kedua jelas menunjukkan bahawa defendan tahu dan sedar benar tentang serahhak tersebut. Kelakuan defendan di dalam menguruskan plaintif kedua tanpa apa-apa campur tangan selanjutnya daripada plaintif pertama selain daripada perlu menandatangani perjanjian asal untuk

membeli adalah mencukupi bagi mahkamah untuk berpuas hati bahawa defendan sememangnya mempunyai notis mengenai, dan secara tersirat bersetuju dengan serahhak tersebut (lihat ms 170D–G).

(2) Mahkamah telah menerima maksud yang diberikan oleh plaintif pertama di dalam keterangannya bahawa 'jual' merujuk kepada penjualan ruang pengiklanan di papan iklan. Ia tidak boleh melampaui sebarang imaginasi bermaksud menjual papan iklan dan memindah hak milik (lihat ms 171D).

(3) Keseluruhan fasal (3) ditulis dengan terma-terma yang menunjukkan bahawa maksud yang diberikan kepadanya adalah bahawa terma-terma yang terkandung di dalamnya adalah syarat-syarat terdahulu kepada keberkesanan perjanjian tersebut (lihat ms 171D–E).

(4) Di dalam industri pengiklanan, 'boleh beroperasi penuh' bermaksud peralatan tersebut telah diuji sepenuhnya dan diterima oleh pembeli. Tiada penerimaan oleh plaintif kedua. Hakikatnya, defendan sendiri melalui suratnya bertarikh 28 Mac 1994 memberikan maksud kepada 'boleh beroperasi penuh' dengan menyatakan bahawa beliau akan memperbaiki beberapa kelemahan dalam masa dua minggu dan beliau telah gagal berbuat demikian. Defendan dengan jelas telah melanggar perjanjian tersebut (lihat ms 173C–D, 174B).]

Notes

For cases on terms generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3009–3094.

Cases referred to

Housing & Development Board v Lee Sem Yoong Sdn Bhd [1987] 2 MLJ 204 (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)

UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

CT Annathurai (*Hamzah Sulaiman & Partners*) for the plaintiffs.

Nitin Nadkarni (*Hwang Min-mei* with him) (*Lee Hishammuddin*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The first plaintiff is the Chairman of a group of companies, one of whose subsidiaries is the second plaintiff. The defendant is the principal

A shareholder in one Flobright Trading Sdn Bhd. Both the plaintiffs and the defendant are actively involved in the outdoor advertising business.

Pursuant to an agreement dated 17 April 1993, the first plaintiff purchased from the defendant an electronic billboard ('billboard'). It was purchased in the first plaintiff's name as he intended to inject it into one of his companies. The first plaintiff however did not receive any cash consideration for the transfer of the said billboard to the second plaintiff which he effected by way of an assignment. The first payment of the purchase consideration to the defendant for the billboard did not come from the first plaintiff but was a set-off of mutual debts existing between the first plaintiff's group of companies and the defendant's group of companies. The billboard did not operate to the satisfaction of the plaintiffs. Dewan Bandaraya Kuala Lumpur ('DBKL') had on several occasions reminded the second plaintiff that if the billboard continued not to be in proper working order it ought to be dismantled and that the licence issued for the site would be revoked. As the billboard continued not to be in proper working order, and pursuant to the deadline issued by DBKL, the second plaintiff dismantled the billboard.

The plaintiffs' claim

The plaintiffs thus claim:

(1) the sum of RM245,938.27;

(2) loss of revenue of RM213,336.00; and

(3) interest.

Findings of the court

I accept the first plaintiff's evidence that he intended to purchase the billboard in his personal name as an interim measure with the intention of subsequently injecting it into one of his companies at a later date. I also accept the unchallenged evidence of the plaintiffs that DBKL issues licences for outdoor billboard advertising sites to companies rather than to individuals. In fact the licences exhibited in the Common Agreed Bundle of Documents (CABD) show clearly that they were all issued in the name of the second plaintiff and not in the name of the first plaintiff.

Actual purchaser of the billboard

There is no doubt in my mind that the defendant was aware that it was the second plaintiff that was the actual purchaser of the said billboard, and not the first plaintiff. From the evidence adduced I find four reasons for arriving at this conclusion. Firstly, the purchase order and the invoice in the CABD are for the cost of relocating the said billboard to its new site including the cost of laying the foundation, setting up the structure, assembling the modules and commissioning the said billboard. This relocation was at the request of DBKL. The purchase order was issued by Masterprints Trading Sdn Bhd, one of the plaintiffs' companies and addressed to Flobright Trading Sdn Bhd which issued the invoice and which was owned by the

defendant in that he was the principal shareholder and director. Secondly, it was the second plaintiff and not the first plaintiff that paid part of the sum claimed in the invoice together with the payment of the balance as admitted by the defendant in his evidence. Thirdly, the defendant himself in his examination-in-chief confirmed that the first payment of RM245,938.27 made to the account of the purchase consideration of the billboard amounting to RM1.2m as stated in the agreement, was effected by way of a set-off of debts owned by the defendant's company to the first plaintiff's companies. Fourthly DW1, a co-director and shareholder of Flobright Trading Sdn Bhd, expressly stated in her police report included in the CABD that the said billboard belonged to the second plaintiff. She also admitted this in her evidence under cross-examination.

The contract

For clarity and for material consideration, the relevant clauses of the contract need to be stated. They are as follows:

(1) The electronic billboard which was relocated from Jalan Syed Putra to Jalan Sultan Ismail/Jalan Raja Chulan was to be commissioned by the defendant.

(2) Costs of relocation and power and telephone connection was to be borne by the first plaintiff.

(3) Payment as set out in the First Schedule in the contract was always subject to the electronic billboard being sold and income received and if no sale was made the payment would be deferred until income was received. The amount of income received should also exceed or equal the payment schedule.

(4) The First Schedule in the contract reflects a payment scheme of five years.

Material evidence of first plaintiff

I accept the first plaintiff's evidence that prior to him purchasing the billboard the defendant had explained that because the said billboard was faulty at that time he was unable to secure clients to take up the advertising time on the said billboard. In addition DBKL had informed the defendant that because of road works to be carried out at the site where the billboard was initially situated, it had to be removed and the defendant had told the first plaintiff that upon dismantling the said billboard he had no other site to locate it and that it would have ended up as scrap.

This evidence is very material when considering the terms as stated in the agreement. The plaintiffs contend that it was a condition precedent to the contract that the advertising time must be sold, and if not sold payment would be deferred, until income is received and which income should also exceed or equal the payments as set out in the First Schedule of payment spread over five years. It is also necessary to reproduce the First Schedule:

FIRST SCHEDULE

Year I	(a)	RM	245,938.27 sum received
	(b)	RM	177,061.73
Year II	-	RM	177,000
Year III	-	RM	200,000
Year IV	-	RM	200,000
Year V	-	RM	200,000
TOTAL	-	RM	1,200,000

The defendant on the other hand denies that these are conditions precedent and that they are mere terms of payment. But more on this later.

The electronic billboard

PW1 explained that the owner of any advertising billboard would rent out the time slots on an hourly basis for a fee, to companies or organisations who wish to advertise their products or to convey a message. I accept the evidence that owning an electronic billboard for renting is a highly risky business because of the large capital outlay involved. The billboard in question, which the defendant wished to treat as scrap itself was sold to the plaintiffs for RM1.2m. There is then the additional cost of maintenance as the electronics system in the said billboard is sensitive, requiring a high cost in maintenance. I also accept the unchallenged evidence of the first plaintiff that it is for these reasons that electronic billboards are a rarity in this country and that the present billboard in question was the first of its kind launched on a commercial basis in Kuala Lumpur or for that matter in Malaysia.

Assignment

A legal assignment is one that complies with s 4(3) of the Civil Law Act 1956 and the said section reads as follows:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

An equitable assignment is one that does not fully comply with the statutory requirements of s 4(3) of the said Act. In *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, Peh Swee Chin FCJ said in the Federal Court at p 775 as follows:

> ... In any event, compliance with s 4(3) is not a pre-requisite to the validity of an assignment, which is to be determined in the usual ways. Even without

> complying with s 4(3), eg even without notice of the assignment to such debtors, for the sake of argument, the assignment would have been valid in equity in any event against the assignor.

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And further down in the same page his Lordship continued:

> ... Section 4(3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant.

B

The written assignment of the rights and liabilities under the said agreement dated 17 April 1993 between the first plaintiff and the second plaintiff is included in the CABD. The plaintiffs maintain that the defendant has had notice of the said assignment which of course is denied by the defendant. Based on the four reasons I had stated earlier for concluding that the actual purchaser of the billboard was the second plaintiff and not the first plaintiff, it is my conclusion that the defendant was well and truly aware that the first plaintiff as such, had no longer a say in the said billboard. In fact, the unrebutted evidence of the first plaintiff of his discussion with the defendant leading to the signing of the agreement between him and the defendant and the subsequent agreement between the defendant's company and a subsidiary of the second plaintiff, clearly indicates that the defendant was well and truly aware of the assignment. The question that arises is, must there be a proper notice of such assignment given either orally or verbally, to the defendant, by the assignor. In this case the defendant specifically denies receiving any such express notice and from the notice of assignment exhibited it is a fact that the same was not copied to the defendant. However, in *Housing & Development Board v Lee Sem Yoong Sdn Bhd* [1987] 2 MLJ 204 (SC), the then Supreme Court was of the view that consent to the assignment can safely be implied from the conduct of the defendant. In the case before me the conduct of the defendant in dealing with the second plaintiff with no further interference from the first plaintiff other than having signed the initial agreement to purchase, is sufficient for me to be satisfied that the defendant had indeed notice of, and had impliedly consented to, the said assignment. The Federal Court in *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365 said at p 372 as follows:

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> The learned judge appears to consider that notice to the guarantor is an essential requirement to constitute equitable assignment. With respect, inasmuch as concerning the validity of an equitable assignment (which the present assignment under appeal is not), notice to the debtor or guarantor is not necessary. In other words, an assignment may be perfectly valid without such a notice (*Gorringe v Irewell India Rubber And Gutta Percha Works* (1886) 34 Ch D 128; *Re City Life Assurance Co (Stephenson's Case)* [1926] Ch 191 at pp 214, 219-220; *Patrick, Bills v Tatham, Re* [1891] 1 Ch 82 at p 87). But it is desirable that such notice be given, because until the debtor or guarantor receives the notice, the debtor or guarantor, as the case may be, is entitled to pay to the original creditor. Also, the giving of such notice may discourage further equities attaching to the debt or claim being created, and may affect priorities of competing assignments (see *Chitty on Contracts, General Principles* (24th Ed) paras 1160, 1184).

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Whilst it is unnecessary to give notice of an equitable assignment to the person legally liable to the assignor, it is desirable to give such notice to prevent the person liable from paying out to the assignor. Hence, since no written notice was given in this case to the defendant and thus the assignment being an equitable assignment the defendant by his conduct has had absolute notice of, has consented to, and acquiesced in the said assignment.

Is there a condition precedent?

The plaintiffs contend that it was a condition precedent to the contract that the advertising time must be sold and if not sold then the payment due would have to be deferred until the income is received and which income should also exceed or equal the payments as set out in the First Schedule of payment which has been spread over for five years. Clause 3(c) of the contract is expressive and clear. Before considering the impact of the said clause it is necessary to ascertain the meaning given to the word 'sold' in the said clause. I accept the meaning given by the first plaintiff in his evidence that 'sold' here refers to the selling of the advertising space on the billboard. It cannot by any stretch of the imagination mean selling of the billboard and transferring ownership. It is a similar concept of a landlord renting out his property to a tenant and not selling the property to the said tenant. The entire cl 3(c) is couched in terms that indicate that the meaning to be ascribed to it is that the terms contained therein are conditions precedent to the effectiveness of the agreement. This becomes clearer when I consider the fact that the said billboard was indeed going for scrap and the defendant must have indeed considered himself fortunate to have been made the offer, to purchase at RM1.2m, by the first plaintiff. I am satisfied that with this good fortune, the defendant must have therefore intended that the terms were to be taken as conditions precedent and not as terms of the agreement as contended by him. In fact the said clause even envisages the possibility that no sale of advertising time might occur and that in such an event even the scheduled payments would have to be postponed. In fact the clause goes on to say that even the income received must exceed or at least equal the sum due on each payment spread over five years. The defendant himself in his evidence had confirmed that the payment of the purchase consideration for the billboard would be due upon the sale of the advertising space of the billboard, and upon income being received from the sale of the space. He even agreed that the payment of the purchase consideration would be postponed in the event the space on the billboard was not let out.

Termination of the agreement

The second plaintiff had terminated the agreement by way of its solicitors' letter dated 18 August 1994. The reason for terminating the agreement was that the defendant had failed to fully commission the said billboard. This was because DBKL had by its letter dated 24 February 1994 and addressed to the second plaintiff, warned that the billboard was not functioning and the second plaintiff was given one month to put it in order, failing which the Licensing Department of DBKL would remove the said billboard. The

defendant had replied by his letter dated 28 March 1994 that the billboard was fully commissioned. However he said some coloured bulbs and drive units had to be replaced for a complete display of visuals and that the same would be done within two weeks. However, nothing was done and the second plaintiff through its solicitors wrote to the defendant on 30 June 1994 pointing out that since nothing had been done, the second plaintiff would take such action as it deemed fit. The defendant then replied by a letter dated 4 July 1994 wherein he maintained that whilst he had commissioned the billboard in March 1994, the board 'was not fully operational because the purchaser had failed to provide a 'Datel telephone line' so that the computer can send messages through the telephone line without any disturbances'. This explanation was unacceptable to the second plaintiff. The defendant then by a letter dated 6 July 1994 informed the second plaintiff that 'the electronic board is fully commissioned now'. The second plaintiff then replied through its solicitors by a letter dated 9 July 1994 denying that the 'Datel telephone line' had not been installed and pointing out that it had already been installed on 29 September 1993 bearing telephone No 2458236. They then pointed out further faults, namely, that:

(i) there were some faulty driver units on the said electronic display board;

(ii) the modems were not functioning; and

(iii) that there were some wiring problems.

They therefore contended that in the light of all these defects the billboard could not be said to be fully commissioned. Receiving no further response, the plaintiffs terminated the said agreement by their solicitors' letter dated 18 August 1994 and sought a refund of the sum paid by way of set-off and also claimed loss of income.

Was the billboard functional or fully commissioned?

PW1, the production manager of the second plaintiff and himself an electronics and design engineer, testified that the billboard was not in proper working order. He explained in graphic detail with reference to a diagram, how the billboard would become functional. He testified that the defendant had purchased the said billboard from a company called Daktronics, based in the United States. He further testified that whilst the billboard was positioned at the original site before removal, it faced:

(i) communication problems due to faulty modems,

(ii) communication problems due to the main process board, and

(iii) wiring problems from the display processing board to the display driver boards also known as modules and that about 30% of the modules on the display panel were defective.

As the defendant could not solve the problems he had informed PW1 that Daktronics of the United States, had appointed Philips Singapore Pte Ltd ('Philips'), its regional representative, to look into the matter. Philips

provided a technical report on 22 March 1994 wherein in its final paragraph whilst maintaining that the billboard was technically functional except for a few display modules which had to be replaced by the defendant, Philips also went on to say that the original modems were configured for leased line operation. A leased line is a dedicated line linking one computer to another with the purpose of limiting communication from one location to another through the shortest route and also allowing for faster communication speed on the modems. Therefore when the leased line operation was reconfigured for switched network operation (meaning an array of telephone switches which are used in a network for use by the public referred to as Public Switched Telephone Network or PSTN), it required a telephone line with similar quality.

Although the defendant had in his letter dated 28 March 1994 contended that the billboard was functional, I do not find that it was so. I accept the evidence of PW1 that in the advertising industry fully commissioned means that the equipment has been fully tested and accepted by the buyer. There was no such acceptance by the second plaintiff. In fact the defendant himself in his letter dated 28 March 1994 qualified the full commissioning by stating that he would rectify certain shortcomings within two weeks; and he failed to do that. In any case to put all doubts at rest that the billboard was indeed not functioning properly is to refer to a fax message dated 13 October 1994 from Philips to the second plaintiff and it is necessary to reproduce the last paragraph which reads as follows:

> As explained, in our fax Refs: 943515/THP. The system was purchased from other parties, so we do not have the spares to diagnose the System conclusively. Therefore, we are unable to comment on your System. However, if you can arrange for all the spares to be available, we can probably help, to identify the possible faults. Meanwhile, please let us have the status of the CPU/modem card.

This fax message was in response to a desperate letter from the second plaintiff to Philips dated 23 September 1994. The short letter reads as follows:

> We are encountering a problem whereby no image/graphics is down loaded to the signboard although the bulbs are constantly lit in several places. Can you please confirm if this is due to the fact that we have not installed a data line. Can you also confirm if a data line is a must for this board to operate.
>
> We hope to hear from you urgently on this matter.

Thus it is apparent that even as at 13 October 1994 Philips could not correctly diagnose the problems which continued to plague this billboard. It is significant to note PW1's answer in re-examination. He testified that he checked with Telekom Malaysia and was informed that at that material time the leased line system was not available in Malaysia. I would have thought that this was a significant piece of evidence that ought to have been challenged by the defence. On this evidence alone it would seem that the defendant had sold the second plaintiff a billboard unsuitable for local use at that material time. No wonder therefore that even Philips was unable to rectify the problems even as at 13 October 1994. Clearly the defendant had failed to fully commission the billboard. Whilst the second plaintiff was

beset with these problems it was assailed on the other hand by DBKL whose last letter dated 13 September 1994 was clear and unambiguous. The second plaintiff was reminded that the said billboard was not functioning properly and was told to put right the matter within one month from the date of the said letter failing which all licences granted to the second plaintiff would be withdrawn and cancelled. Faced with this dilemma I cannot fault the second plaintiff for terminating the agreement. The defendant has clearly breached the agreement.

Since the amount of RM245,938.27 is not in dispute, I award the second plaintiff the said sum.

Loss of income

The second plaintiff had led evidence that it had entered into an agreement with Ogilvy & Mather Pte Ltd ('Ogilvy') to let the space on the replaced billboard for a term of three years commencing from 1 December 1994 to 30 November 1997. The said agreement was included in the CABD. The annual rental was agreed to at RM320,000 plus 5% service tax and this worked out to RM26,667 per month. This figure was not challenged nor was any other evidence led by the defendant. According to the defendant's letter dated 28 March 1994 (exhibited as 1 CABD 25) the defendant ought to have commissioned the billboard in March 1994. The second plaintiff claims a loss of eight months' income from March to November 1994 since the replaced billboard started providing revenue as of 1 December 1994. I am of the view that the proper period to calculate the loss of income would be to calculate the loss from 1 April 1994 to the date of the notice of termination, that is, 18 August 1994, that is, $4^1/_2$ months. This will result in a loss of income of $4^1/_2$ months x RM26,667 amounting to RM120,001.50.

The second plaintiff will have interest on both the awards at 4% from date of termination of the agreement to judgment.

To my mind, the first plaintiff has been unnecessarily brought in as a party. The defendant ought to have applied to strike him off as a party. This was not done. However, I shall only award costs to the second plaintiff in respect of this suit.

Counterclaim

In the light of my findings that the second plaintiff is entitled to terminate the agreement there is no question therefore of the plaintiffs having to pay the balance of the purchase price. The counterclaim therefore stands dismissed with costs, only to the second plaintiff.

Claim allowed.

Reported by Jafisah Jaafar